United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1550

B

P/s

To be argued by
ROBERT L. ELLIS

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1550

UNITED STATES OF AMERICA,

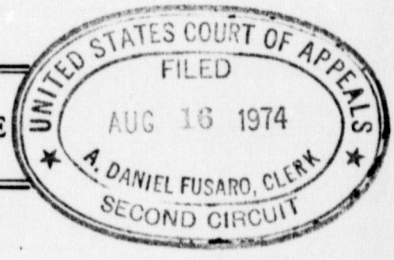
Appellee,

—against—

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF OF DEFENDANT-APPELLANT ANGELO MAMONE

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THE UNITED STATES OF AMERICA,

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BRIEF OF DEFENDANT-
APPELLANT ANGELO MAMONE

QUESTIONS PRESENTED

The questions presented are:

1. Whether the evidence is sufficient to sustain defendant Angelo Mamone's ("Mamone") conviction of conspiracy to violate the narcotics laws;

2. Whether Mamone was deprived of a fair trial by:

a) the trial court's determination permitting the jury to consider a hearsay statement that Mamone was the partner of defendant Joseph DiNapoli;

b) the failure to grant sufficient pretrial disclosure to adequately apprise him of the charge and enable him to prepare his defense;

c) improprieties in the summation of the United States Attorney;

d) the trial court's imbalanced summary of the evidence; and

e) the failure of the trial court to grant him a severance.

In addition, Mamone contends that he was deprived of a fair trial by the denial of defendant DiNapoli's motions to suppress and exclude from evidence approximately one million dollars seized from an automobile occupied by DiNapoli and one Vincent Papa on February 3, 1972.* We therefore adopt and incorporate by reference Points I and II of the DiNapoli brief relating to the seizure of and failure to exclude the million dollars (Rule 28[i], Federal Rules of Appellate Procedure).

We also adopt and incorporate by reference, pursuant to Rule 28(i) F.R.A.P., defendant Gamba's contentions with respect to improprieties in the selection of the jury and the contentions of defendants Inglese and Christiano concerning the use of evidence obtained through illegal electronic surveillance as well as all other points raised on behalf of co-appellants.

*The actual sum seized was $967,450. However, for convenience we refer to the seized money as "the million dollars".

STATEMENT OF THE CASE

Preliminary

Mamone appeals from a judgment of conviction of conspiracy to violate 26 U.S.C. §§4705(a), 7237(b), 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) entered in the United States District Court for the Southern District of New York on April 22, 1974, after a trial before Judge Kevin Thomas Duffy and a jury. In response to a specific inquiry propounded by the court the jury found that Mamone had entered the conspiracy prior to May 1, 1971, and that he continued to participate after that date. He was accordingly sentenced under 21 U.S.C. §174, since repealed, to ten years imprisonment.

FACTS

Introduction

No evidence was introduced in the course of this lengthy and complex trial that Mamone bought, sold or possessed narcotics. There was no evidence that he was present at a narcotics transaction; that he discussed narcotics or that he ever stored, cut, possessed or touched narcotics. No witness claimed that he initiated, arranged, planned, financed, directed, managed or supervised any activity connected with

narcotics. Yet Mamone stands convicted as a narcotics conspirator, sentenced to ten years imprisonment.

As will be shown, Mamone was ill-equipped to defend against the meager circumstantial evidence adduced against him for he was brought to trial virtually without pretrial disclosure upon an indictment which contained no specific allegation about the nature of his participation in the conspiracy excepting a single overt act which the United States Attorney conceded upon trial was insufficient to place him in the conspiracy.

The direct testimony against Mamone, which consists of less than twenty transcript pages of the approximately 6,000 pages of trial testimony, shows that he associated with some of the conspirators at a neighborhood club where he and other neighborhood people who were not indicted herein went to gamble. The testimony also shows that in the course of his attendance at the club he had casual contact with some of the alleged conspirators which we contend is too trivial and far removed from success or failure of the business of the conspiracy, the illegal distribution of narcotics, to establish his membership in a criminal venture.

The jury's ability to objectively consider the tenuous evidence against Mamone may have been overwhelmed by the inherently prejudicial magnitude of the trial* and the spill-over effect of evidence of substantial wrongdoing by others. During the trial, which lasted approximately two months, evidence of major narcotics dealings unrelated to Mamone was introduced and the staggering sum of one million dollars taken from DiNapoli and Vincent Papa, yet not otherwise connected to Mamone or, indeed, to this case was improperly received. The unjustified introduction of the million dollars created enormous prejudicial taint which engulfed all defendants. Its prejudicial effect was compounded by DiNapoli's defense that the money was derived from a loan sharking operation for which he was convicted and imprisoned at the time of trial.

Mamone was personally prejudiced by the million dollars and DiNapoli's said defense because the court erroneously admitted into evidence a hearsay declaration that DiNapoli and Mamone were partners, thus improperly tying Mamone to the million dollars and DiNapoli's loan sharking venture. The proceedings were

*There were thirty-three indicted defendants, eighteen of whom actually went to trial. At trial's end, there were sixteen remaining defendants. It was apparent from the outset that Mamone's connection, if any, with this massive case was tenuous. However, our pretrial and other motions for a severance were denied (S. 3, 264; Supp. App. 22-3).

further tainted by evidence that another defendant, Frank "Butch" Pugliese, shot an alleged co-conspirator, "Paulie-the-Arrow" (1420) and by disclosures that defendants Pugliese and Inglese had been previously incarcerated.*

At the culmination of the trial, Mamone was subjected to an inflammatory summation by the United States Attorney which was followed by a prejudicially imbalanced marshalling of the evidence by the trial court, a summary which, standing alone, could have tipped the scales against him.

The Indictment, Preliminary Motions and Opening of the Trial

On or about October 3, 1973, Mamone and 32 others and numerous co-conspirators were charged with conspiracy to violate the narcotics laws. The indictment, which also contained 28 substantive counts, provided no hint of the role Mamone was alleged to have played in the alleged conspiracy. It did not even allege an overt act in which he

*Numerals in parentheses refer to pages of the Joint Appendix. Those preceded by the letter "S" refer to the transcript of the suppression hearings. Those preceded by the letter "C" refer to transcripts of pretrial conferences. Those not preceded by a letter refer to the trial transcripts.

was involved.* On December 6, 1973, a superseding indictment was returned, which with respect to Mamone merely added, as an overt act, that "In or about November, 1970, defendant Angelo Mamone went to the Beach Rose Social Club, Bronx, New York." Neither indictment charged Mamone with a substantive offense.

Because of the lack of detail in the indictments, it became essential that Mamone be granted adequate pretrial disclosure if he was to be enabled to effectively prepare his defense (United States v. Branan, 457 F. 2d 1062, 1065 [6th Cir. 1972]). Accordingly, on October 29, 1973, he moved, among other things, for a bill of particulars pursuant to Rule 7(f) and for discovery and inspection pursuant to Rule 16, Federal Rules of Criminal Procedure. The bill of particulars motion essentially sought to ascertain details of the overt acts allegedly committed in furtherance of the conspiracy and the nature of Mamone's alleged participation in the venture (Mamone's request for particulars is set forth in full in our Supp. App. pp. 5-13, 19-20).

*On October 29, 1973, Mamone unsuccessfully moved to dismiss the first and only count against him as failing to comply with the requirement of Rule 7e, F.R.C.P., that the indictment "shall be a plain and concise statement of the essential facts constituting the offense charged."

Mamone's specific requests for particulars were denied. However, he was apprised in a bill of particulars which the government voluntarily served on all defendants that it was alleged that he entered the conspiracy in November, 1970, when he went to the Beach Rose Social Club "to assist defendant Inglese in counting the proceeds of a narcotics transaction" (government's bill of particulars, pp. 2, 8). In other words, the bill of particulars merely added to the overt act in the superseding indictment that when Mamone went to the Beach Rose Social Club in November, 1970, he did so to count the proceeds of a narcotics transaction. This money counting incident was the only element of the government's specific case against Mamone disclosed before trial. Upon trial, the United States Attorney conceded that it was not sufficient to place Mamone in the conspiracy (5061).*

Throughout the pretrial period, the hearings on defendant DiNapoli's motion to suppress the million dollars and during the early days of trial Mamone repeatedly asked for further disclosure or in the alternative for a continuance on the ground that he could not adequately investigate the charge and prepare his defense without additional informa-

*It was not until January 24, 1974, following a further motion made during trial that the government divulged that the persons present at the money counting episode were Mamone, Inglese and John Barnaba.

tion (Supp. App. pp. 26-7; S. 6a, 7, 118, 263, 336; C. 32-3). Each such request was denied (id. and see also, S. 336, 416).

Without meaningful particulars Mamone could not investigate the charge before trial. His effort to obtain information from the voluminous debriefing and other tape recordings of various witnesses was fruitless for none contained his voice or even a mention of his name (S. p. 118).

Upon trial, the government's opening statement described the role allegedly played by each defendant. Some were said to be wholesale or retail sellers of narcotics (13). Others were described as managers, mixers, suppliers, customers, financiers or "stashes" (11, 16, 17-18, 20, 21). However, the government did not even hypothesize a role for Mamone, except to say that he (20-21) "was more or less a jack of all trades...[he] on one occasion...helped Inglese count the proceeds of a narcotics transaction." Then the government injected a new contention - "He also settled a dispute...where one of the customers of Mr. Barnaba claimed that the narcotics was not good, was not sufficiently pure."

Mamone moved to dismiss on the ground that the government's opening was fatally defective in that it

failed to adequately apprise him of the government's intended proof (37). The motion was denied as was Mamone's request for the time, persons and subject matter involved in the "dispute" which he allegedly settled (37).

Thus, as the prosecution's testimony began, the only specification of the charge afforded Mamone consisted of partial details of the concededly insufficient money counting incident and a general allusion in the opening statement to the settlement of a dispute. Mamone was to learn of every material detail of the government's case, as the United States Attorney forewarned, "as the proof unfolds" (37). Can there be any doubt that the impact of the evidence upon the jury was compounded by Mamone's lack of an opportunity to investigate the actual case against him before trial, to seek rebuttal evidence and to prepare a defense thereto?

The Evidence as to Mamone

Mamone does not challenge that the jury could find the existence of a conspiracy. He contends that the proof was insufficient to establish his membership therein. That proof came almost entirely from two conceded narcotics dealers with lengthy records of criminal

involvement, Frank Stasi, the steward at the Beach Rose Social Club, and one John Barnaba. With respect to Mamone, it covered a brief period in or about November and December, 1970, and a two-day period in August, 1971.

(A)

The Beach Rose Social Club at Wilkenson and Westchester Avenues in the Bronx was a social facility where many neighborhood people, including Mamone, came to play in the card games which took place there "each and every day from early afternoon until late in the morning" (719). Frank Stasi* testified that Mamone came to the Beach Rose Social Club three or four times a week to play cards, just as he went to other places to gamble. For, as Stasi readily conceded, Mamone was a gambler (381, 719-20).

Stasi testified that he saw Mamone speak to defendant Inglese, the proprietor of the club (318). However, he did not hear what they spoke about. On one occasion Inglese sent Stasi to Mamone's home to tell Mamone that he would like to see him. Stasi did not know why Inglese wanted to see Mamone (381-2).

*As steward, Stasi served coffee, drinks and food to the card players at the club and kept score for their games. He also parked cars and ran errands for the card players (273, 718).

Stasi described the Beach Rose Social Club as a large room, about half as wide and as long as the courtroom (716).* It was furnished with a bar half the size of the jury box, furniture for the card games and a back room for television viewing, a fully equipped kitchen and a bathroom (716-718).

The size of the Beach Rose Club room is significant for, although the record indicates that a number of narcotics transactions centered about the club, those involved would have no trouble concealing their activities from outsiders who were merely at the club to gamble. Indeed, Stasi described the surreptitious manner in which arrangements were made. When Inglese spoke to Stasi about narcotics, he called him outside the club (285) or to the side (287) so that the card players and other outsiders such as Mamone would not overhear the conversations (721-22). Thus, although the record shows that Mamone often went to the Beach Rose Social Club to play cards, as did many neighborhood people who were not before the court, there is nothing to establish that he participated in or was even aware of the narcotics activities which took place there. Certainly there is no claim that Mamone was on hand during any narcotics transaction.

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*The case was tried in Room 110 in this building.

If Mamone were involved in the narcotics activities which emanated from the Beach Rose Social Club, Frank Stasi, the steward who was always present and who gave detailed testimony concerning other defendants, undoubtedly would have known and so testified. However, as noted, neither he nor any other government witness suggested that Mamone was ever directly involved with narcotics.

(B)

John Barnaba, who possessed a record of major criminal offenses dating back to the early 1950's, described three episodes allegedly involving Mamone.* He also told of a hearsay statement of one Pat DiLacio to the effect that Mamone and DiNapoli were partners (1461-2, and see Point II, infra, pp. 40-3).** However, Barnaba's testimony must be viewed against his admissions that he had no knowledge of Mamone ever buying or selling narcotics and that he, Barnaba, never bought, sold or attempted to buy or sell narcotics to or from Mamone (1639).

*Both Barnaba, the principal witness against Mamone, and Stasi, the only other person to mention him in more than a passing fashion, became cooperating witnesses after they were arrested for narcotics violations.

**On cross-examination, Barnaba conceded that he did not know whether Mamone and DiNapoli were partners (1640).

Moreover, Barnaba admitted that to the best of his knowledge Mamone never possessed a narcotic drug or engaged in a narcotics transaction (1639-40).

The first alleged event related by Barnaba occurred in November, 1970, after Barnaba had sold a quarter kilogram of heroin to Richard Forbrick, with whom he admitted extensive narcotics dealings. Barnaba returned to the club with $5,500 he received from Forbrick and gave the money to Inglese at the bar. Inglese asked Mamone, who happened to be nearby, to help him count the money. Barnaba, who described this incident in detail, did not claim that narcotics were mentioned in Mamone's presence (1358-60). Thus, there is nothing to establish that Mamone knew in November, 1970, that he was counting the proceeds of a narcotics transaction.

The second incident occurred a month later in December, 1970, as a result of $3,500 given by Forbrick to Barnaba for an eighth kilogram of heroin. Barnaba testified that Inglese could not immediately deliver the drugs which had been ordered by Forbrick through Barnaba. Barnaba, who was being pressed by Forbrick for delivery or the return of his money, returned to the club daily for "about ten days, maybe more" (1365). On each occasion he saw Inglese who assured him that he need not worry about the

delivery (1366). However, Forbrick continued to press Barnaba for a refund of his money. Finally, on one occasion Mamone, who allegedly happened to overhear one of the conversations between Barnaba and Inglese said that Forbrick "was okay...that his wife and [Forbrick's] wife were good friends" (1368-9).

It is respectfully submitted that this incident is insufficient to tie Mamone to Forbrick or to Barnaba, for on cross-examination, Barnaba admitted that he did not know whether Forbrick and Mamone had ever met or spoken with each other (1655). John Barnaba further conceded that Mrs. Mamone had known the Forbricks during the early 1960's, long before her marriage to Angelo Mamone. Mrs. Mamone, then a young girl, possibly a teenager, had been a baby sitter for the Forbricks who were friends and neighbors of her parents (1921-4). At the time John Barnaba was the owner of a used car lot across the street from the homes of the Forbricks and the parents of Phyllis Zaccolillo who many years later was to marry Angelo Mamone (id.). The record does not indicate that Mrs. Mamone saw or spoke to the Forbricks since the early 1960's and, as noted, that defendant Mamone himself knew, saw or spoke with the Forbricks at any time.

After the aforesaid Forbrick incident Mamone's name does not reappear in Barnaba's narrative until in or about nine months later, August, 1971. During May, 1971, Barnaba was employed as a salesman at Jimmy's Used Car Lot in the Bronx (1421). That month Barnaba sold an eighth kilogram of narcotics to one Burke who had been referred to him by Forbrick (1422-3). However, the quality of the drug proved unacceptable to Burke and he came looking for Barnaba and intimidated his employer and family at gunpoint in an attempt to extort the return of his money (1424).

Barnaba immediately turned to Inglese for help (1427, 1662). Inglese agreed to try "to find out who he is, maybe I can do something, I'll let you know" (id.). A few days after the initial conversation between Barnaba and Inglese, still in May, 1971, Barnaba again went to Inglese. He "kept going to the club to ask whether Inglese had found where Burke could be reached, whether Inglese knew Burke" (1664).

Finally, "some time in July or August, 1971," two or three months after he last heard from Burke and first sought to enlist Inglese's help, during which time he was continually returning to the club to discuss the matter with Inglese, Barnaba returned to the Beach Rose Social Club when Mamone happened to be present. Barnaba

asked Inglese, as he had been doing for months, if he had identified Burke, when Mamone who allegedly overheard the conversation "chimed in that he knew him and that he could straighten it out" (1666). Here too, there is no evidence that Mamone was aware that the Barnaba-Burke problem had its roots in a narcotics dispute, for Barnaba, who had been discussing the matter with Inglese for three months, did not mention narcotics in the conversation overheard by Mamone (id.). In any event, according to Barnaba, Mamone said that Burke was a customer of his (although he did not say what Burke was his customer for) and that Burke owed him $25,000 or $30,000 (1427, 1669).

A few days later Barnaba met Mamone outside the club. Mamone said that he had spoken to Burke and had resolved the matter. Burke was to deduct the $3,000 from the money he owed Mamone and Barnaba would repay that sum to Mamone. Barnaba admitted, however, that he never gave Mamone any money (1428). The date of the aforesaid Barnaba-Mamone meeting was fixed as August 20, 1971, by a group of surveillance photographs taken on that day (government exhibits 20-20e, 1671).*

*The government argued that the fact that Barnaba did not hear from Burke after August, 1971, corroborated Barnaba's account of this incident. The fact is, however, that Barnaba did not hear from Burke after May, 1971, two or three months before Mamone supposedly resolved the matter.

(C)

Other than what has been discussed above with respect to Mamone, there is only the testimony of Jean Patalano, the common-law wife of Joseph DiNapoli, that she knows Mamone, whom she met through his mother-in-law, the former owner of a local restaurant she frequented, and has known Mamone longer than she knows DiNapoli (3267-8) and the testimony of Joseph DiBenedetto that on occasion Mamone patronized the Cottage Inn, a public licensed premises (4146).

Mamone's motions for judgment of acquittal made at the end of the government's case and repeated at the end of the entire case and after the verdict were denied. Ironically, in the case of a co-defendant, Joseph Marchese, the trial court granted a motion for judgment of acquittal although there was direct, uncontradicted testimony from Stasi that he had given a half kilogram of heroin to Marchese (315-16, 4476). Similar motions were denied with respect to Mamone upon a record devoid of substantial evidence that he was a part of a narcotics conspiracy.

SUMMARY OF ARGUMENT

We urge first that the evidence is insufficient to establish that Mamone was a member and participant in a criminal conspiracy and that the court below erred in denying his motions for a directed verdict of acquittal. United States v. Bufalino, 285 F. 2d 408, 417-18 (2nd Cir. 1960). We will argue in this respect that the jury could find no more than that Mamone associated with and had incidental contacts with some of the conspirators. Under the authorities cited below, such associations and contacts are protected activities within the First Amendment. Mamone's acts were too trivial and remote to have given any significant impetus to the venture. They were thus too trivial and remote to give rise to criminal liability under the First and Fifth Amendments. At best, upon this record, the jury could have found that Mamone was a "casual facilitator". We will further argue that if criminal liability can attach from the multitude of possibilities arising from the constitutionally protected associations, then the conspiracy statute, as applied, is unconstitutionally vague.

It is respectfully submitted that under any view of the case the evidence against Mamone was marginal at best. Thus, we argue, in the event this Court rejects our

sufficiency contention, that a combination of trial errors deprived Mamone of a fair trial and impaired objective evaluation by the jurors of the slender, circumstantial case against Mamone. In this respect we contend that it was serious error for the court to have received a hearsay declaration that Mamone was the partner of defendant DiNapoli since the requisite legal evidence linking Mamone to the conspiracy was lacking and it was not shown that the said statement was uttered in furtherance of the conspiracy.

In addition, we contend that Mamone could not prepare his defense against the circumstantial evidence adduced against him because pretrial disclosure was so grossly inadequate that he first learned of the substance of the case against him when the government's witnesses actually testified. The impact of the government's evidence was undoubtedly increased by the fact that Mamone had no opportunity before trial to investigate the charge, obtain rebuttal evidence or to prepare his defense.

Finally, we contend that the jurors' ability to objectively evaluate the evidence may have been impaired by the sheer magnitude of the case and the court's failure to grant Mamone a severance, by the prejudicial impact of the million dollars, by the United States Attorney's inflammatory summation and by the trial court's imbalanced summary of the evidence.

In United States v. Geaney, 417 F. 2d 116, 121 (1969) this Court noted that pieces of evidence must be viewed not in isolation but in conjunction. So, here too, we submit that when the evidence against Mamone is viewed against a background of this entire record and in conjunction with the aforesaid trial errors, it is apparent that Mamone's guilt was not established beyond a reasonable doubt upon a trial fair as to him.

Eighteen years ago the Supreme Court admonished that it "will view with disfavor attempts to broaden the already pervasive and wide sweeping nets of conspiracy prosecutions". Grunewald v. United States, 353 U.S. 391, 404 (1956). If that warning is to be heeded, we respectfully submit that Angelo Mamone's conviction must be reversed.

I

THE EVIDENCE IS INSUFFICIENT TO ESTABLISH MAMONE'S GUILT OF THE CONSPIRACY COUNT BEYOND A REASONABLE DOUBT

We respectfully submit that upon the entire record, viewing the evidence in a light most favorable to the government (Glasser v. United States, 315 U.S. 60 [1942]), and recognizing that the conspiracy may be proved by circum-

stantial evidence (United States v. Borelli, 336 F. 2d 376 (2nd Cir. 1964), cert. denied, sub nom, Mogavero v. United States, 379 U.S. 960 (1965), the jury could not properly find beyond a reasonable doubt that Mamone, with criminal intent, had entered into a meeting of the minds with the conspirators to adopt their common design, purpose or objects. It is fundamental that:

> "the essence of the crime of conspiracy is an agreement to violate the law. Carter v. United States, 33 F. 2d 354 (10th Cir.). While the agreement need not take any particular form, there must at some point be a meeting of the minds in the common design, purpose or objects of the conspiracy. One cannot become a conspirator until he has entered such an agreement." (United States v. Butler, 494 F. 2d 1246, 1249 [10th Cir. 1974])

See also, United States v. Peoni, 100 F. 2d 401, 403 (2nd Cir. 1938).

Equally fundamental is that guilt is personal, that the government must show that Mamone knowingly agreed to enter into the narcotics distribution conspiracy charged in this indictment. Kotteakos v. United States, 328, U.S. 750, 772-3 (1946). United States v. Borelli, supra. We submit that the government has failed to meet its burden of establishing that Mamone willingly joined this narcotics distribution venture; at best, the jury could only find that he had associations and incidental contacts with some of the conspirators.

Evidence that Mamone Associated and Had Incidental Contacts with Some Conspirators is Insufficient to Establish his Participation in the Conspiracy

Even if the jury could find that Mamone was aware of the criminal activities of some of the conspirators, his guilt was not established, for mere knowledge of the existence of the conspiracy and even approval of its aims without actual participation, does not make one a member thereof. United States v. Bostic, 480 F. 2d 965 (6th Cir. 1973). So, too, close and repeated association with the conspirators is insufficient to support a finding of participation. United States v. Stromberg, 268 F. 2d 256 (2nd Cir. 1959); United States v. Fantuzzi, 463 F. 2d 683, 690 (2nd Cir. 1972); United States v. Keach, 480 F. 2d 1274 (10th Cir. 1973). Proximity to the locations where the conspiracy was carried out is also insufficient. Murray v. United States, 403 F. 2d 694, 696 (9th Cir. 1968). See also, United States v. Stephenson, 474 F. 2d 1353, 1355 (5th Cir. 1973).

Judge Learned Hand wrote in United States v. Falcone, 109 F. 2d 579, 581 (2nd Cir. 1940), aff'd, 331 U.S. 205, that in order to become a member of a criminal conspiracy, one:

> "must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities for great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

Similarly, it was pointed out in United States v. Cianchetti, 315 F. 2d 584, 588 (2nd Cir. 1963):

> "...knowledge of the existence and goals of a conspiracy does not of itself make one a conspirator. There must be something more than '[m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy * * *'. This 'something more' is generally described as a 'stake in the venture.' '[I]n prosecutions for conspiracy * * * [the defendant's] attitude towards the forbidden undertaking must be more positive * * * he must in some sense promote their venture himself and make it his own, have a stake in the outcome.'"

In Panci v. United States, 256 F. 2d 308, 312 (5th Cir. 1958), a contention that a defendant was obligated to refrain from association with criminals was rejected as follows:

> "Giving the evidence its fullest force, it amounts to no more than that Panci was seen associating with characters of low repute, and, if this

> conviction is allowed to stand, the result would be to convict him on suspicion. There is a proverb that a man is known by the company he keeps, and another one, 'Give a dog a bad name and it will kill him', but these are not legal principles which will serve to convert inadmissible hearsay into admissible testimony or support a conviction on testimony merely that a defendant is seen in bad company."

Accord, United States v. Amato, 495 F. 2d 545 (5th Cir. 1974); Roberts v. United States, 416 F. 2d 1216, 1221 (5th Cir. 1969); Wood v. United States, 283 F. 2d 4, 6 (5th Cir. 1960); Carbo v. United States, 314 F. 2d 718, 734 (9th Cir. 1963); and see also, United States v. Spock, 416 F. 2d 165, 179 (1st Cir. 1969), where it was observed that:

> "One may belong to a group, knowing of its illegal aspects, and still not be found to adhere thereto."

So, too, here, Mamone could attend the Beach Rose Social Club, knowing that some illegal activities were carried on there, and still not incur criminal responsibility.

At bar, each of Mamone's alleged acts was subsequent to and far removed from the success or failure of any underlying narcotics transaction and was too trivial to affect the success or failure of a conspiracy. There is no credible evidence whatever in the record that he had

a stake in the outcome. There is not a scintilla of evidence that he personally had anything to do with narcotics. The evidence is therefore insufficient to support a finding that Mamone intended to promote the venture and make it his own. United States v. Falcone, supra.

We recognize that this Court has held that it is not necessary to prove a conspiracy to violate the narcotics laws that there be proof of actual dealings in narcotics where there is substantial evidence of actual participation in the venture. United States v. Aviles, 274 F. 2d 179, 188 (2nd Cir. 1960); United States v. Agueci, 317 F. 2d 817, 828-9 (2nd Cir. 1962); United States v. Nuccio, 373 F. 2d 168, 174 (1967), cert. denied, 387 U.S. 906 (1967). Nevertheless, we submit that the total absence of evidence that Mamone had anything to do with narcotics and the tenuous nature of the government's proof strongly suggest that he was not a member of this conspiracy. Ong Way Jong v. United States, 345 F. 2d 392, 395 (9th Cir. 1957); Evans v. United States, 257 F. 2d 121, 126 (9th Cir. 1958).

The fact that Mamone may have spoken to Inglese about an unknown subject is of no probative value (Glover v. United States, 306 F. 2d 594 [10th Cir. 1962]). So, too, the chance interventions in conversations between Barnaba and Inglese involved in the money counting incident; the Forbrick incident in which Mamone said that Inglese could meet with Forbrick because his wife had known the

Forbricks, and his efforts to make peace between Barnaba and Burke cannot support the inference that Mamone, with criminal intent, intended to and did become a member of a criminal narcotics conspiracy.

It is well settled that the criminal intent necessary to establish membership in conspiracy is the same as that required to establish the substantive offense. Ingram v. United States, 360 U.S. 672, 678 (1959); United States v. Jit Sun Loo, 478 F. 2d 401 (9th Cir. 1973). We submit that there is no evidence to support the inference beyond a reasonable doubt that in the incidents described above, Mamone acted with the degree of criminal intent necessary to establish a federal narcotics violation.

"Vaporing remarks" by Mamone that Burke was "his customer", without proof that narcotics was involved, without even an approximate date of actual sales within the period of limitations or the period alleged in the indictment are not competent to establish that Mamone was a part of the conspiracy involved here. United States v. Bostic, 480 F. 2d 965, 967 (6th Cir. 1973); and see, United States v. Stromberg, supra (268 F. 2d at p. 267). The fact is that the record is devoid of evidence that Mamone had narcotics dealings with Burke.

> "Possibilities, however numerous, do not supply proof." United States v. Martinez, 486 F. 2d 15, 24 (5th Cir. 1973).

However, even if such evidence existed it could not establish that Mamone was a member of this conspiracy because there is no proof that at the time of such hypothetical dealing either Mamone or Burke had any relationship to the instant conspiracy whatever. There is a failure of proof that such sales, if they existed at some indeterminate time in the past, were in furtherance of this conspiracy, as distinguished from a separate and distinct Mamone-Burke venture.

In United States v. Andolschek, 142 F. 2d 503, 507 (2nd Cir. 1944), this Court, per Learned Hand, analyzed a comparable situation by noting:

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. This is of course an error: the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime."

So, too, hypothesizing that Mamone may have had narcotics dealings with Burke and that Burke subsequently may have entered into this conspiracy, such does not establish Mamone's membership in the venture in the absence of proof that Mamone's "dealings" occurred within the term of and were connected with this conspiracy.

The principles that complicity in a criminal conspiracy may not be predicated on association, knowledge of the venture or proximity to the conspirators, and that a substantial and material participation in the enterprise is required before a criminal agreement may be inferred, arise out of fundamental First and Fifth Amendment precepts. The fact that this is a narcotics conspiracy case involving First and Fifth Amendment rights rather than a classic speech or press case does not create "a talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment". Cf. New York Times v. Sullivan, 376 U.S. 254, 269.

In Scales v. United States, 367 U.S. 203, Mr. Justice Harlan wrote (at p. 224):

> "It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that 'act' alone need be doing nothing more than signifying his assent to

> its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever."

Mamone's attendance at the Beach Rose Social Club - which was not an illegal organization but a neighborhood gathering place - and his association and incidental contacts with some members of the conspiracy who frequented the club cannot constitutionally be deemed criminal, for the evidence fails to establish that he gave the "concrete, practical impetus to a criminal enterprise" required under Scales to constitute a crime.

Indeed, Mamone's right to attend the Beach Rose Social Club, to associate with whomever he found there, to engage in incidental contacts with those persons and, to lend them a "sort of moral encouragement" (Scales v. United States, supra) as established by this record, are

as much constitutionally protected activities within the ambit of the First Amendment as was the speech involved in Spock and Scales.

Association and other conduct ordinarily within the scope of the First Amendment cannot constitutionally be made the basis for criminal liability unless it creates an imminent and substantial likelihood of furthering the illegal objects of the conspiracy. See, e.g., Wood v. Georgia, 370 U.S. 375, 384 (1962), where Chief Justice Warren pointed out that the "clear and present danger standard" has been described as 'a working principle' that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be proscribed. Here, the substantive evil - illicit distribution of narcotics - is concededly extremely serious. However, we submit that the degree of imminence resulting from Mamone's incidental activities is so remote and inconsequential that it would be constitutionally impermissible to impose criminal sanctions therefor.

At Most, the Jury Could Find That Mamone was "A Casual Facilitator"

In United States v. Hysohion, 448 F. 2d 672, 678 (1959), this Court could "find no evidence...which would support the existence of an unlawful agreement" upon a record far stronger than that at bar. Hysohion held that evidence that service as an intermediary between buyer and

seller until the buyer and seller were willing to deal with eachother was insufficient to establish a defendant's membership in the conspiracy (at p. 347):

> "We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller, who was Roupinian, and Rimbaud."

Here too, the fact that Mamone told Inglese that Inglese could meet with Forbrick or the fact that Mamone tried to make peace with Barnaba and Burke does not necessarily imply that there was an unlawful agreement to which Mamone was a party. See, United States v. Martinez, 486 F. 2d 15, 24 (5th Cir. 1973).

Hysohion relied on United States v. Jones, 308 F. 2d 26 (1962) where this Court, sitting en banc, held that the introduction of a willing buyer to a willing seller by one not in possession or control of the drug was insufficient to constitute constructive possession, an element required to trigger the then statutory presumption of knowledge of illegal importation arising from

actual or constructive possession, and thus to establish membership in the conspiracy.*

The Jones court, citing Hernandez v. United States 300 F. 2d 114 (9th Cir. 1962) drew a distinction between a co-conspirator, who was required to have at least constructive possession of or dominion over the drugs and a casual facilitator. The conspirator must have:

> "a working relationship or a sufficient association with those having physical custody of the drugs so as to enable him to assure their production, without difficulty...But a casual facilitator of a sale, who knows a given principal possesses and trades in narcotics but who lacks the working relationship with that principal that enables an assurance of delivery, may not be held to have dominion and control over the drug delivered and cannot be said to have possession of it." (308 F. 2d at p. 30)

See also, United States v. Santore, 290 F. 2d 51 (2nd Cir. 1960), where in reversing a conviction this Court noted, 290 F. 2d at p. 62:

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*We recognize of course that it is not necessary to establish actual or constructive possession of a controlled substance under the present law. United States v. Masullo, 489 F. 2d 217 (2nd Cir. 1973). However, since Mamone was found guilty under both the old and present law and he was sentenced under the old law, 21 U.S.C. 174, a finding of possession is a necessary element to the validity of a part of his conviction and his sentence. Moreover, the concept of the "casual facilitator" remains the law today, infra, p. 35.

> "[Santore] was not a member of the conspiracy in the sense that he had a voice in the deciding, or could control, what was to be done with the narcotics. On the contrary, Santore functioned only as an intermediary between the agents, as purchasers, and Casella and his partners, as sellers."

See, also to the same effect, United States v. Steward, 451 F. 2d 1203 (2nd Cir. 1971).

Here, the evidence was insufficient to establish that Mamone was a member of the conspiracy because his relationship with the co-conspirators gave him no voice in or control over what was to be done with the narcotics, nor did Mamone have actual or constructive possession thereof. Upon this record, Mamone cannot be chargeable with constructive possession of drugs. He had no actual possession. It is therefore submitted that the jury could not properly find that Mamone violated 21 U.S.C. 174, as it did, for if anything, the proof shows that he was no more than a "casual facilitator". Cf. United States v. Lopez, 355 F. 2d (2nd Cir. 1966).

Mamone's conviction and sentence under 21 U.S.C. 174 must be reversed because he lacked the actual or constructive possession of narcotics necessary to

give rise to the pre-1971 statutory presumption of knowledge of illegal importation. United States v. Harling, 463 F. 2d 923 (D.C. Cir. 1972). Thus, even if this Court were to sustain the conviction under the Comprehensive Drug Abuse Prevention & Control Act, Mamone's sentence should be vacated and the matter remitted to the District Court for re-sentencing. We respectfully submit however that the holdings that one who renders inconsequential assistance to the conspiracy is merely a "casual facilitator" and not a member of the conspiracy also require reversal of Mamone's conviction under the present law. See United States v. Purin, 486 F. 2d 1363, 1369 (2nd Cir. 1973) confirming that it remains the rule in this Circuit that a willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, is insufficient to establish a conspiracy.

Certainly Mamone's acts of "vouching" for Forbrick who wanted to see Inglese to get his money refunded and his intervention in the Burke controversy are of lesser culpability than the introduction of a willing buyer to a willing seller found insufficient in Hysohion, Jones and Santore, or the driving of the car to a narcotics rendezvous by Sands found insufficient in the Steward case; and with respect to the insufficiency of the Forbrick incident, see also, United

States v. Steele, 469 F. 2d 165 (10th Cir. 1972); United States v. Thomas, 468 F. 2d 422, 425 (10th Cir. 1972); and United States v. Jit Sun Lee, 478 F. 2d 401, 407 (9th Cir. 1973); United States v. Schorr, 462 F. 2d 953 (5th Cir. 1972).

The acts held insufficient to support conviction in the cited cases were all significant steps toward the consummation of narcotics transactions whereas the acts apparently found by the jury against Mamone were separate and distinct from the underlying transactions, all of which had been fully consummated without any participation by Mamone.

If Mamone's Acts are Deemed Sufficient to Support the Finding that he Entered into an Illegal Agreement in Violation of the Conspiracy Statute, That Statute, as Applied, is Unconstitutionally Vague

In Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961) it was held that:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391. 'No one may be required at peril of life, liberty or property to speculate as to

> the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U.S. 451, 453. 'Words which are too vague and fluid...may be as much of a trap for the innocent as the ancient laws of Caligula.' United States v. Cardiff, 344 U.S. 174, 176."

And in Baggett v. Bullitt, 377 U.S. 360 (1964), Mr. Justice White met head-on the question posed in Cramp, as to whether phrases such as, knowingly "aid", "support", "advise" or "counsel" an illegal organization in a statute touching First Amendment rights were unconstitutionally vague. His conclusion after probing the multitude of possibilities opened by the indefinite character of these words was that "this statute, like the one at issue in Cramp is unconstitutionally vague," (377 U.S. at 368).

Mr. Justice Frankfurter, in one of his last opinions warned against the danger of penal statutes with "vague overreaching tests of criminal responsibility". The Justice wrote in words here specially relevant:

> "those statutes...had a double vice of deterring the exercise of constitutional freedoms by making the uncertain line of the Amendment's application determinative of criminality and of prescribing indefinite standards of guilt, thereby allowing the potential vagaries and prejudices of juries, effectively insulated against control by reviewing courts, the power to intrude upon the protected sphere. Shelton v. Tucker, 346 U.S. at 490, 492."

Under any circumstances, "the modern crime of conspiracy is so vague that it almost defies definition." (Krulewitch v. United States, 336 U.S. 440 (1948), concurring opinion of Jackson, J. at pp. 446-7). However, if the inherently indistinct lines of the crime of conspiracy are extended beyond acts in substantial and immediate furtherance of the enterprise to include the multitude of lesser possibilities which can arise from licit associations, such as assisting one who turned out to be a narcotics dealer in counting money, or the offhand, casual interventions involved in the Forbrick and Burke incidents, as sufficient evidence to support the finding of an illegal agreement, then men of common intelligence must necessarily guess at the reach of a conspiracy statute which may be so applied (Connally v. General Construction Company, supra), and subject their liberties to the vagaries and prejudices of juries effectively insulated from review by the Appellate Courts (Shelton v. Tucker, supra). In such case, we submit that the conspiracy statute at bar would be unconstitutionally vague as applied.

II

THE EFFECT OF VARIOUS TRIAL ERRORS COMBINED TO DEPRIVE MAMONE OF A FAIR TRIAL

In the event this Court rejects our contention that the evidence is insufficient to sustain Mamone's

conspiracy conviction, we urge that various trial errors, including the receipt of a hearsay statement that Mamone and D. Napoli were partners, the receipt of the million dollars, the failure to grant Mamone a severance, the inadequacy of pretrial disclosure which deprived Mamone of notice of the substance of the case against him until, as the United States Attorney put it, "the proof unfolded"(37), thus preventing him from preparing his defense, the inflammatory summation of the United States Attorney and the imbalanced summary of the evidence by the trial court, together and separately deprived Mamone of a fair trial.

While such errors may not require reversal where evidence of guilt is clear, a new trial is required when the evidence is marginal because the prejudicial effects of such trial errors are more likely to have tipped the scales against the defendant. Cf. Cross v. United States, 353 F. 2d 454 (D.C. Cir. 1965).

In Kotteakos v. United States, 328 U.S.750, 772-3 (1946), it was noted that:

> "Guilt...remains individual and personal, even as respect conspiracies. * * * When many conspire, they invite mass trial...Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in relation to the mass."

It is respectfully submitted that at bar there was a total failure to employ "every safeguard to individualize" Mamone with respect to the mass, as a result of which he was deprived of a fair trial.

The Trial Court Erred in Admitting Hearsay Evidence Against Mamone

John Barnaba testified that on one occasion, Pat DiLacio, a fugitive defendant, told Barnaba that, having been unable to buy narcotics from DiNapoli, he was trying to see DiNapoli's partner, "Butch" Mamone (1461-2)*. The record does not disclose the basis of DiLacio's belief that Mamone and DiNapoli were partners nor does it indicate that DiLacio, DiNapoli or anyone else actually went to Mamone to obtain or discuss narcotics. Indeed, Barnaba did not count Mamone among the persons he believed to be dealing in narcotics for in the course of his cooperation with state authorities following his arrest Barnaba, while wearing wire recording equipment, attempted to induce those he knew or believed to be involved in narcotics to deal with him. Barnaba testified that he did not then approach Mamone - or for that matter at any other time - obviously because he did not know or believe Mamone to be a narcotics dealer (1920).

*Barnaba was evidently surprised at DiLacio's suggestion that "Butch" Mamone and DiNapoli were partners (id.). All previous indications were that it was DiNapoli and Butch Pugliese who were partners (1457-8, 2131).

A motion to strike DiLacio's out of court statement was made and repeated on several occasions (3708, 3887-8, 4377, 4493, 4652)*. The said motion was denied (4884) as was an omnibus motion made on behalf of all defendants to strike all hearsay taken subject to connection (4494).

We urge that the Court erred in permitting the jury to consider DiLacio's hearsay utterance because (i) there was no adequate foundation of legal evidence to establish Mamone's membership in the conspiracy and (ii) DiLacio's remark was merely narrative hearsay not made in furtherance of the conspiracy.

In United States v. Fantuzzi, 463 F. 2d 683, 688 (2nd Cir. 1972), Judge Waterman wrote:

> "It is hornbook law that before the statements of the other conspirators concerning Bruno may be used as evidence against him, it must be proved that Bruno was in fact part of the conspiracy. See, i.e., Glasser v. United States, 315 U.S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680 (1942). Thus, as it was held in United States v. Geaney, 417 F. 2d 1116, 1120 (2nd Cir. 1969), cert. denied, sub nom.

*Before trial, defendants were granted a standing objection to hearsay admitted subject to connection on the conspiracy (5446). The existence of such standing objection was acknowledged by the Court during the trial (5459-60).

> Lynch v. United States, 397 U.S. 1028, 90 S. Ct. 1276, 25 L. Ed. 2d 539 (1970), 'the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances.'"

See also, United States v. Perez, 493 F. 2d 1339, 1342 (10th Cir. 1974).

It is respectfully submitted that the trial court erred in admitting DiLacio's hearsay statement because Mamone's participation in the conspiracy was not established either "by a fair preponderance of the evidence independent of the hearsay utterances" (United States v. Fantuzzi, supra), or by evidence "enough to take the question to the jury" (United States v. Nixon, infra).*

Moreover, since there is no evidence that DiLacio, DiNapoli or anyone else attempted to obtain narcotics from Mamone, the statement that "he was trying to see Mamone" was merely a narrative declaration of unconsummated intent and therefore not in furtherance of the conspiracy. Thus,

*While Fantuzzi, supra, indicates that the trial judge must find participation in the conspiracy by a fair preponderance of the legal evidence before admitting the hearsay, it now appears to be the law that "as a preliminary matter there must be substantial independent evidence of the conspiracy at least enough to take the question to the jury." United States v. Nixon, ____ U.S. ____ 42 L. W. 5237, 5243 (July 24, 1974, N. 14. (Emphasis added.)

even if an adequate foundation for the co-conspirator exception to the hearsay rule were established, DiLacio's utterance should nevertheless have been excluded, for only hearsay statements made in furtherance of the conspiracy are admissible. See, Anderson v. United States, ___ U.S. ____ (June 4, 1974); 41 L. Ed. 20, 28 and cases therein cited.

Furthermore, even if Barnaba's ambiguous testimony is construed to be a declaration by DiNapoli that Mamone was his partner, it should have been excluded for the declarations of one member of a partnership, made outside the presence of another, are incompetent to prove that the other person is in fact a partner in the absence of a prima facie showing of partnership by other evidence. Dulien v. St. Lewis, 198 F. 2d 301 (D.C. Cir. 1952); Katz Exclusive Millinery, Inc. v. Reichman, 14 F.R.D. 37 (W.D. Mo. 1953).

The prejudicial impact of DiLacio's out of court utterance was substantial because it permitted the government to tie Mamone to DiNapoli's admitted loan sharking activities, his narcotics activities and of course to the million dollars

The Insufficiency of
Pretrial Disclosure

As heretofore noted, Mamone first learned of every material element of the case against him; viz, the Burke and Forbrick incidents and the alleged DiNapoli partnership, during the trial. He was prevented from preparing a defense against the meager circumstantial evidence because, after two indictments and repeated motions for particulars, the only fact specifically pertaining to Mamone received before trial was that he was alleged to have joined the conspiracy in November, 1970, when he went to the Beach Rose Social Club to assist in counting the proceeds of a narcotics transaction, a fact which the government conceded was insufficient to establish Mamone's participation in the conspiracy* (5016).

We urge that the insufficiency of the pretrial disclosure, in view of the general and skeletal indictments, violated Mamone's Fifth and Sixth Amendment rights to be adequately informed of the nature and cause of the accusation against him in sufficient detail to enable him to prepare his defense. Russell v. United States, 369 U.S. 749, 764 (1962); United States v. Owen, 415 F. 2d 383 (8th Cir. 1969).

*As noted, our requests for a continuance to enable us to conduct further pretrial investigation were denied. (S. 416; Sup. App.pp. 26-7)

In United States v. Owen, supra, it was held that (at p. 388):

> "Inherent in the most narrow view of due process is the right to know of adverse evidence and the opportunity to rebut its truth and relevance."

See also, United States v. Cummins, 425 F. 2d 646 (8th Cir. 1970). Here, as predicted by the United States Attorney, Mamone and his counsel learned of the material aspects of the charge against him "as the proof unfolded" (37). He had no opportunity whatever before trial to investigate and rebut evidence of the Forbrick and Burke incidents or the alleged partnership with DiNapoli, for until that time, Mamone had no hint that those incidents constituted the charge against him.*

Of course, it cannot be contended that Mamone did not need further disclosure because he was aware of the facts because such assumption would be contrary to the presumption of innocence to which Mamone and each defendant was entitled. See, e.g., United States v. Tucker, 262 F. Supp. 305, 307 (S.D.N.Y. 1966).

*The government could not have been prejudiced by disclosure of the Forbrick or Burke incidents since its principal witnesses were sequestered. In any event, see Mr. Justice Brennan, "Remarks on Discovery", 33 F.R.D. 47, 56 (1963).

In United States v. Palmisano, 273 F. Supp. 750 (E.D. Pa. 1970), it was stated that:

> "The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law; and notice of the charge or claim against him; not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process...". (Emphasis added.)

Corollary to the right of a defendant to adequate notice and an opportunity to defend the charges against him is that particulars of the charges should be given sufficiently in advance of trial to afford a defendant an adequate opportunity to investigate and prepare to rebut the government's case. Cf. United States v. Kelly, 420 F. 2d 26 (2nd Cir. 1969).

We recognize of course that an application for a bill of particulars is addressed to the discretion of the court. However, the trial court's exercise of that discretion is reviewable on appeal. United States v. Russo, 260 F. 2d 849 (2nd Cir. 1958). The rule that the grant of particulars rests in the discretion of the court cannot

"serve as a shield to all appellate review of bill of particulars claims" (United States v. Kaplan, 470 F. 2d 100, 103 (7th Cir. 1972) where, as here, notice of every material element of the case is withheld until trial.

In United States v. O'Connor, 237 F. 2d 466 (1956), this Court noted that the discovery and bill of particulars provisions of the Federal Rules of Criminal Procedure were intended to enable an accused to meet the charges against him, prevent surprise and protect against double jeopardy, and directed that:

> "They should be liberally construed to carry out this purpose...of course, the defendant must not be allowed to rummage about freely in the Government's files or working papers, or avoid the burdensome chore of preparing for trial; but where he genuinely lacks knowledge, he should not be denied information relevant to his defense by a restrictive interpretation of the Federal Rules of Criminal Procedure." (Emphasis added.)

Accord, Lucas v. United States, 104 F. 2d 225 (D.C. Cir. 1939); United States v. Burgio, 279 F. Supp. 843 (S.D.N.Y. 1968); United States v. Tanner, 279 F. Supp. 457, 470 (N.D. Ill. 1967); United States v. Anderson, 254 F. Supp. 177, 180 (W.D. Arkansas 1966); 8 Moore's Federal Practice, ¶7.06 and, see also, Dennis v. United States, 384 U.S. 855, 871 (1966) where the Supreme Court noted that in

a mass conspiracy case there is a "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice". See, too, American Bar Association, Project on Minimum Standards for Criminal Justice; Standards Relating to Discovery and Procedure Before Trial 1:2 (1970).

As long ago as 1932, the Third Circuit held in Singer v. United States, 58 F. 2d 74, 76:

> "When it appears that the indictment does not inform the defendant with sufficient particularity of the charges against which he will have to defend at the trial, he is entitled to a bill of particulars, if seasonal application is made therefor. The defendant may demand this as a matter of right, even though the indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced bad on motion to quash or demurrer, where the charge is couched in such language that the defendant is liable to be surprised and unprepared."

Here, because the indictment - essentially a paraphrase of the statute - was couched in such general language that Mamone inevitably would be surprised and unprepared to meet the material portions of the charge against him, he was entitled to adequate particulars as a matter of right.

In United States v. Manetti, 323 F. Supp. 683, 695-6 (D. Del. 1971), the court discussed the difficulty in reconciling the needs of the defense with those of the prosecution when a bill of particulars is requested. But, at the bottom line:

> "a defendant is entitled to have the government inform him, either by way of indictment or bill, only of those central facts which will enable him to conduct his own investigation to the transactions giving rise to the charge."

As pointed out above, before trial Mamone was not informed, either by way of indictment or bill, of "those central facts which will enable him to conduct his own investigation to the transactions giving rise to the charge"; viz, the Burke and Forbrick incidents and the alleged DiNapoli partnership.

The denial of adequate pretrial disclosure was not merely a violation of an abstract right, but involved real, hard prejudice; not only because the suppressed incidents constituted virtually the entire case against Mamone, but also because each incident described by John Barnaba involved a person who could not testify because he was either deceased, disabled or a fugitive, so that each incident required independent pretrial investigation if Barnaba's accounts were not to be de facto conclusive and binding upon Mamone.

We were able to learn during the course of the trial that Burke was killed in a domestic quarrel in August, 1972 (Supp. App. p. 45). Similarly, we determined in the course of the trial that Forbrick had been disabled by a stroke. However, under the pressure of trial, we were unable to investigate whether Forbrick could physically have met with Inglese as suggested by Barnaba or where Burke may have been during the spring and summer of 1971, when he allegedly was dealing with Barnaba, or any other detail of those incidents (id.). Pat DiLacio, a defendant in this case who allegedly told Barnaba that Mamone was DiNapoli's partner was a fugitive, so his version of the alleged Mamone-DiNapoli partnership was not available. It is virtually certain that the impact upon the jury of Barnaba's uncontradicted account of his dealings with Burke, Forbrick and DiLacio was increased by Mamone's lack of opportunity to develop possible rebuttal evidence through adequate pretrial investigation.

Improprieties in the United States Attorney's Summation

In Berger v. United States, 295 U.S. 78 (1934) it was pointed out that:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

> shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every ligitimate means to bring about a just one."

To the same effect, United States v. Tomaiolo, 286 F. 2d 568 (2nd Cir. 1961); Cross v. United States, 353 F. 2d 454 (D.C. Cir. 1965); United States v. McFarland, 150 F. 2d 539 (D.C. Cir. 1945) and, see also, Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962).

In United States v. Puco, 436 F. 2d 761, 762 (2nd Cir. 1971), this Court criticized prosecution statements which tended to put the prestige of the United States Attorney's office behind the government witnesses. Here, not only did the United States Attorney put his prestige and that of his office behind the government witnesses, he invited the jury to "try the government" and argued that it would find "that the government and its witnesses have been entirely truthful and candid (5031). See United States v. Coppola, 479 F. 2d 1153, 1163 (10th Cir. 1973); United States v. Drummond, 481 F. 2d 62 (2nd Cir. 1973). Specifically, as against the "diversionary tactics" of the defense, Mr. Curran invited the jury (5031):

> "to try us, the government. In fact, we urge you to try us. Try us with a careful review of all the facts that are before you; before you in evidence on the record, in pictures, in documents, on tapes. When you do this we submit you will find that the government and its witnesses have been entirely candid and truthful." (Emphasis added.)

Manifestly, it was not the government who the jury was required to try, nor were the government witnesses part of a government team to be jointly evaluated by the jury with members of the prosecution staff.

In addition, Mr. Curran invited the jury to acquit "all 16 defendants" if it found that the government connived to fabricate prosecution evidence. See, e.g., 5038, 5042, 5139. Precisely this line of argument was condemned in United States v. Brawer, 482 F. 2d 117, 133 (2nd Cir. 1973).

In the course of his summation, the United States Attorney repeatedly suggested that defense attorneys were attempting to confuse or mislead the jury while placing his own credibility in issue (see, e.g., 5140). See, United States v. White, 486 F. 2d 204 (1973) and cases therein cited.

Not content with having injected the prestige of his office into the jury's deliberations, the United States Attorney argued that the jury would have to find that the trial court would countenance perjury before it could reject the testimony of government witnesses (5049)*:

> "to assume that Tennessee Dawson can help himself by committing perjury before you in this case is to assume that Judge Duffy, who heard and saw him testify, will reward Tennessee Dawson for lying to convict innocent people."

Substantially the same argument was later repeated with respect to Judge Duffy and an unidentified federal judge in Newark (5056).

In a flagrant attempt to inject an atmosphere of intimidation and criminality into the courtroom, the United States Attorney seized upon the presence of the brother of a defendant among the spectators in the courtroom and invited the jury to (5094):

> "think about this, please, ladies and gentlemen...DiNapoli was sitting as a spectator in the second row right here staring at Stasi while Stasi testified. What does your common sense tell you about that?" (Emphasis added.)

*Objections were repeatedly asserted to this and other statements and arguments made by Mr. Curran during summation (5050, 5067, 5071-75, 5152).

Shortly thereafter, Mr. Curran again suggested that Vincent DiNapoli had some ulterior purpose in attending his brother's trial: "Vincent DiNapoli came to court. He didn't come to testify up there, no" (5129). Such comments infringe on defendants' constitutional right to a public trial and are per se prejudicial. Cf. United States v. Kobli, 172 F. 2d 919 (3rd Cir. 1949); Tanksley v. United States, 145 F. 2d 58 (9th Cir. 1944).

The language of United States v. Whitmore, 480 F. 2d 1154, 1156 (D.C. Cir. 1973) where a narcotics conviction was reversed because of improprieties in the government's summation could readily be applied here:

> "the prosecutor's conduct was not an isolated, momentary aberration occurring in the heat of trial, but was a deliberate, calculated and successful effort to prejudice the defendant by references to matter that was not in evidence. Such tactics cannot be tolerated."

Accord, Washington v. United States, 327 F. 2d 793 (5th Cir. 1964); United States ex rel. DiVita v. McCorkle, 248 F. 2d 1, 10 (3rd Cir. 1957).

So, here too, the United States Attorney's deliberate attempt to persuade the jury that the orderly observation of the proceedings by a close relative of a defendant was actually an attempt to intimidate a witness, should not be tolerated.

In an emotional peroration, Mr. Curran branded defense counsel as "advocates obligated to argue" for their clients - clients who he had contended for hours were reprehensible criminals and then, as distinguished from the defense attorneys and their clients, he too was an advocate for his client, the United States (5140):

> "Well, ladies and gentlemen, as the United States Attorney for this district, I have a great obligation too and esteem for my client. My client is the United States. I want to leaveyou with the knowledge that that obligation is one to which I am firmly committed.
>
> "Ladies and gentlemen, we have an obligation to justice. That is my obligation, it is Mr. Phillips', Mr. Fortuin's, Mr. Engel's*, in this case and in every case."

See, Greenberg v. United States, 280 F. 2d 472, 474 (1st Cir. 1960), where a similar appeal was condemned.

It is respectfully submitted that in aligning the prosecution team on the side of its client, the United States of America,"committed to justice", while suggesting that the defense had a lesser commitment because they had obligations to their clients", Mr. Curran seriously

*Each of whom was an Assistant United States Attorney assigned to assist in the trial of this case. Counsel took immediate exception to Mr. Curran's remarks (5041-2).

deviated from the prosecutorial standards demanded by the Supreme Court in United States v. Berger, supra.

The impact of the United States Attorney's inflammatory summation was magnified by repeated misstatements of the evidence concerning Mamone. For example, it will be recalled that when Barnaba sold a package of heroin to Burke which proved unsatisfactory, Barnaba sought to enlist the help of Inglese. He went to Inglese immediately after the first threat from Burke in May, 1971, and continued to solicit help from Inglese during the ensuing two or three months when, finally on one occasion in July or August, Mamone overheard one of the Barnaba-Inglese conversations and allegedly intervened with Burke on Barnaba's behalf (supra, pp. 16-17).

However, as described by Mr. Curran (5062-3):

> "So Burke went looking for Barnaba and Barnaba got concerned. Barnaba went to Inglese...
>
> "Inglese told him, 'Don't be concerned about it.'
>
> "Again, the defendant Mamone heard - overheard, heard - he was there...Barnaba is telling Inglese, 'The guy Burke, he's after me, claims that stuff is no good.' And in the same conversation the defendant Mamone says, 'I'll take care of it, he is a customer of mine.'" (Emphasis added.)

Mr. Curran's misrepresentation that Mamone overheard Barnaba's complaint during the "same conversation" that Inglese first heard of the problem when, in fact Mamone chanced to hear about the incident after Barnaba had been visiting Inglese over a period of months, improperly buttressed the government's assertion of Mamone's omnipresence at the club and its otherwise unsupported argument that Mamone "operated at the highest levels of this conspiracy" (5060). Moreover, contrary to Mr. Curran's argument, the record does not disclose that narcotics were mentioned during the course of the conversation overheard by Mamone (1428, 1662-65). This Court has held that such misrepresentations of the testimony cause "inevitable prejudice" to defendants, United States v. Drummond, supra, 481 F. 2d at p. 64.

Furthermore, it was improper for Mr. Curran to have argued (at p. 5060) that "we also know from the testimony of John Barnaba and Frank Stasi that the defendant Mamone was active...in the narcotics business which defendants Inglese, Joe Crow, etc. ... operated since neither Barnaba nor Stasi testified that Mamone was active in a narcotics business. It will be recalled that Stasi did no more than say that Mamone came to the club to gamble and on occasion spoke to Inglese while Barnaba disclaimed knowledge of any Mamone connection with narcotics activities.

On occasion, otherwise improper prosecutorial statements have been justified as appropriate responses to defense arguments. See, e.g., United States v. Santana, 485 F. 2d 365 (2nd Cir. 1973). It is respectfully submitted, however, that nothing in our arguments on behalf of Mamone questioned the credibility or integrity of the United States Attorney or otherwise justified the kind of summation leveled against Mamone. Such improprieties and the misstatements of the evidence as those discussed above were not provoked by anything said on Mamone's behalf. Their prejudicial force was increased coming as they did from the United States Attorney rather than from a subordinate. It is respectfully submitted that they transcend the level of harmless error and require a new trial. United States v. Serrano, 496 F. 2d 81 (5th Cir. 1974).

The Trial Court's Imbalanced Summary of the Evidence was Inherently Prejudicial

At the conclusion of its charge on the law, the Court embarked on a comprehensive and detailed summary of the evidence (5218 et seq.). Each and every detail of the government's case against Mamone was recalled for the benefit of the jury (see, e.g., 5237-8, 5260, 5262-4, 5268). Yet, when it came to Mamone's contentions, the Court merely charged:

> "Defendant Mamone also relies upon the presumption of innocence and claims that the witnesses against him did not give credible evidence.
>
> "Defendant Mamone introduced business records which showed that he moved his household goods to Florida on May 25, 1973. He asks how could he be included in this alleged on-going conspiracy taking place in the Bronx when he had moved to Miami. In effect, he contends that his move shows that he was no part of the alleged conspiracy." (5314)

In United States v. Garguilo, 310 F. 2d 249, 254 (2nd Cir. 1962), Judge Friendly noted in language particularly appropriate here:

> "The closeness of the issue... imposed an obligation on the trial judge to instruct the jury with extreme precision, as he realized, and on us to review the charge with what, in a less doubtful case, would be undue meticulousness... Reading the entire charge, we cannot overcome a fear that the judge, quite unwittingly and simply by emphasis, may have led the jury to believe that a finding of presence and knowledge... was enough for conviction."

So, here too, "quite unwittingly" the judge may have led the jury to believe that the Beach Rose Social Club was a hotbed of overt narcotics distribution rather than the neighborhood gambling club from which surreptitious narcotics activities emanated as described by Stasi, and

also that all persons present at the club were a part of a narcotics operation although neither Barnaba nor Stasi suggested that this was the fact.

Mamone objected that the court completely omitted mention of defense contentions established upon cross-examination (5335-6). Specifically, it was urged that the cornerstone of Mamone's defense was the absence of specific evidence of narcotics involvement as acknowledged by Barnaba, and Stasi's testimony on cross-examination that Mamone was a gambler who, as did many neighborhood people, went to the Beach Rose Social Club to gamble (id.). We further requested the Court to dispel the impression that anyone at the club was necessarily aware of the narcotics activities therein by mentioning Stasi's admission that the arrangements for cutting sessions were surreptitious, precisely for the purpose of not allowing outsiders present at the club to learn thereof (id. and see also, pp. 5346-7).

The Court appeared to agree that it would instruct the jury that the Beach Rose Social Club "was a social club with card games and gambling going on in there and all kinds of people went there" (5347). However, without further explanation, the Court declined to summarize this and other vital evidence favorable to Mamone; leaving the entire emphasis of its marshalling on the prosecution's affimative

evidence as opposed to Mamone's ostensible sole reliance on the presumption of innocence and his move to Florida early in 1973.

We recognize that the trial judge may summarize and comment upon the evidence in his discretion. He need not relate all of the evidence for the choice of the matter he elects to comment upon rests in his sound discretion. United States v. Tourine, 428 F. 2d 865, 869 (2nd Cir. 1970); United States v. Edwards, 366 F. 2d 853, 869 (2nd Cir. 1966). Yet it is axiomatic that this discretion is not absolute (Quercia v. United States, 289 U.S. 466, 460) and that a fair and impartial picture of the evidence must be given. United States v. McCarthy, 301 F. 2d 796, 802 (3rd Cir. 1962).

The fairness of the trial court's presentation of the evidence must be judged in the context of the entire record. United States v. Tourine, supra. When the marshalling of the Mamone evidence, coming as it did on the heels of a summation replete with improprieties, is viewed against this complex and lengthy record containing only marginal evidence of his guilt, it becomes apparent that the Court may have unwittingly created the erroneous impression that Mamone primarily relied on the presumption

of innocence, by relating prosecution evidence in full and failing to mention the significant evidence of Mamone's non-involvement which was developed on cross-examination.* In so doing, the court created a seriously imbalanced picture which could have tipped the jury toward conviction in this close case. See, People v. Bell, ___A.D. 2d ____ (1st Dept. June, 1974), where the Appellate Division ordered a new trial in substantial part because of the undue emphasis the trial court placed on the prosecution case.

In United States v. Kelly, 349 F. 2d 720, 757 (2nd Cir. 1965), it was held that the failure of the trial court to marshall the evidence in a manner which would place clearly before the jury the qualitative difference in evidence against various defendants was so vital and prejudicial as to require reversal, even in the absence of objection by trial counsel. Accord, United States v. Garguilo, supra.

In United States v. Dunmore, 446 F. 2d 1214, 1218 (8th Cir. 1971) it was stated:

> "While a federal trial judge is permitted to comment on the evidence and witnesses in his instructions to the jury, United States v. DuPugh, 434 F. 2d 548 (8th Cir. 1970), Kramer v. United States, 408 F. 2d 837 (8th Cir. 1969), he must studiously avoid one-

*As noted, Mamone's ability to assert an affirmative defense was negated by the inadequacy of his pretrial disclosure. If Mamone had been afforded a reasonable opportunity to develop rebuttal evidence, the imbalance of the summation may not have been so pronounced.

> sidedness...In this case, the court undertook to review what was designated as uncontroverted facts. In doing so, no mention whatever was made of any evidence favorable to the contention of the defendants, although there was such evidence in the record, and at least some of it stood uncontradicted. The charge is replete with repetitions and reiterations of evidence favorable to the government, with no reference to any evidence favorable to the defendants. * * *". Boatright v. United States, 105 F. 2d 737, 739 (8th Cir. 1939).

Accord, United States v. Brandom, 479 F. 2d 830 (8th Cir. 1973); United States v. Cooper, 357 F. 2d 274 (D.C. Cir. 1966).

It is respectfully submitted that the distorted last-minute impression carried by the jury into its deliberations created by the Court's imbalanced presentation of the evidence concerning Mamone was not offset by instructions that the jury's recollection of the evidence was to control. In light of the complexity and size of the record, and the Court's apparently complete and exhaustive summary, such limiting instructions were to no avail. Cf. Bruton v. United States, 391 U.S. 123 (1968); United States v. Bufalino, supra, 285 F. 2d at p. 417-18.*

*The Court's charge covers pp. 5156 to 5354 of the record and took approximately eight hours to deliver. It is respectfully submitted that there is serious doubt as to whether a charge of this length could be comprehensible to the jury. United States v. Persico, 349 F. 2d 6, 8 (2nd Cir. 1965).

The Trial Court Erred in
Failing to Grant a Severance

We recognize of course that the grant of a severance is within the discretion of the District Court and that such discretion is seldom disturbed on appeal (United States v. Projansky, 465 F. 2d 123 [2nd Cir. 1972]). However, despite the usually limited scope of review, in United States v. Kelly, 349 F. 2d 720 (2nd Cir. 1965), this Court found an abuse of discretion in the failure to grant a severance to a fringe conspirator in a protracted conspiracy prosecution because (at p. 759):

> "inevitable prejudice...was caused by the slow but inexorable accumulation of fraudulent practices by Shuck's co-defendants Kelly and Hagen. The ingenious schemes and designs they formulated to cover their tracks as well as the shameless way in which they manipulated the market, thumbed their noses at the SEC and feathered their nests at the public expense, concealing their ill-gained payoffs by means of organizations formed under the secrecy laws of Lichtenstein and Switzerland, must have stamped them in the eyes of the jurors as unscrupulous swindlers of the first rank. That some of this rubbed off on Shuck we cannot doubt. When this accumulation reached its peak in the offer into evidence of the administrative testimony of Kelly and Hagen and the letter by Kelly connected therewith, and this testimony and the letter received in evidence, it is clear to us that the motion then made by counsel for Schuck for a severance should have been granted."

The position of a fringe defendant in a mass conspiracy case is a difficult one. As was noted in Krulewitch v. United States, supra, 336 U.S. at p. 454:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

To avoid prejudice to Mamone, a fringe defendant in this mass trial, Kelly required that severance be granted for the same reasons existing with respect to Shuck in Kelly exist with respect to Mamone here. The proof against Mamone was scant at best. As noted, actual reference to Mamone in the direct testimony consumed less than twenty pages out of a 6,000 page record. Here, as in Kelly, inevitable prejudice was caused by the inexorable accumulation of testimony of major narcotics dealings by some of Mamone's co-defendants. The impact of such narcotics dealings was magnified by evidence of loan sharking activities and crimes of violence by other co-defendants which had a comparable effect to the cover-up efforts of the Kelly

defendants. The scope of their narcotics operation must have stamped those co-defendants in the eyes of the jurors as major narcotics offenders of the first rank. The proof reached its peak with the receipt in evidence of one million dollars taken from DiNapoli and Papa. Some of this inevitably rubbed off on Mamone as he was compelled to sit through weeks of sensational testimony which was unconnected to him except that he was seated at defendants' table as one of thirty-two indicted and one of eighteen persons on trial.

It is fundamental that there is a continuing duty at all stages of the trial to grant a severance for prejudice (United States v. Morgan, 394 F. 2d 973 [6th Cir. 1968]; United States v. Donaway, 447 F. 2d 940 [9th Cir. 1971]). Here we respectfully submit that there was serious likelihood that Mamone was prejudiced by a joint trial in that the jury was not able to separate the highly sensational and dramatic evidence adduced against other defendants from the grossly disproportionate and tangential proof offered against him. Under the circumstances, it was error to deny a severance.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed against defendant Mamone. In the alternative, the judgment of conviction should be reversed and a new trial ordered. Failing such relief, Mamone's conviction and sentence under 21 U.S.C. 174 should be vacated and the matter remitted to the District Court for sentence pursuant to 21 U.S.C. 841, et seq..

August 16, 1974.

Respectfully submitted,

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